

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-6478
v.	:	
	:	CRIMINAL ACTION
	:	NO. 90-353-1
JAMES HILL, JR.	:	

M E M O R A N D U M

BUCKWALTER, J.

April 6, 1998

On April 3, 1991, James R. Hill ("Hill") was found guilty of several charges stemming from his possession of cocaine and firearms while on parole and was sentenced by this court on July 2, 1991 to an aggregate sentence of 188 months. After unsuccessfully seeking relief through direct appeal, Hill filed several petitions for habeas relief pursuant to 28 U.S.C. § 2255. In his first petition (92-cv-5709) Hill claimed that he received ineffective assistance of counsel, that tainted evidence was used at trial and that this court lacked jurisdiction. After considering the merits of these claim and the government's response I denied Hill's petition on December 9, 1992. Hill's second petition (93-cv-2327) again raised tainted evidence claims and alleged prosecutorial misconduct. After considering the merits of these claims along with the government's response I denied Hill's second petition on November 16, 1993. Hill

challenged the length of his sentence in light of the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995) in a third § 2255 petition (95-cv-5035), filed on August 9, 1996 as well as through a "Motion to Dismiss Indictment" which was filed on November 20, 1995. In response the government conceded that under Bailey, Count V, charging violation of 18 U.S.C. § 924(c) (use of firearms during commission of a drug trafficking offense) should be vacated. Accordingly, on March 8, 1995 I granted Hill's motions in part and on November 8, 1996 vacated Count V and resentenced Hill. On resentencing, however, a two level weapons enhancement was applied, as requested by the government. As a result the actual length of Hill's sentence was not altered. Presently, before the court is Hill's fourth § 2255 motion. In the instant motion Hill: 1) challenges jury instructions given at his trial -- specifically he claims that instructions given regarding the § 924(c) charge were misleading because his conviction on this charge was later vacated; 2) claims that his trial counsel provided ineffective assistance and 3) requests my recusal.¹ I cannot consider the merits of these claims at this time. Hill's present motion is successive and therefore requires authorization from the Court of Appeals prior to filing.

1. This is not the first time Hill has sought my removal. On December 5, 1995 I denied Hill's "Motion to Disqualify Judge" (90-cr-353-1; Docket No. 76) and on November 4, 1997 Chief Judge Cahn denied Hill's motion letter requesting my removal (90-cr-353-1; Docket No. 110).

Hill's present motion was filed after April 24, 1996, therefore the "Antiterrorism and Effective Death Penalty Act" ("AEDPA") applies. The AEDPA states that before a district court can consider a "second or successive" § 2255 motion the defendant must first obtain from a three judge panel of the court of appeals an order authorizing the district court to consider the motion. 28 U.S.C. §§ 2244, 2255. Nowhere in the AEDPA is the term "second or successive" motion defined. However, the text of the AEDPA reveals that the terms refer to § 2255 motions that raise new claims as well as to motions that raise claims previously presented in a prior application.² Dellorfano v. United States, 1997 WL 379170 *3 (E.D.Pa. June 26, 1997). Thus, under the AEDPA, subsequent § 2255 motions that raise claims not previously presented in a prior application are also termed "second or successive." See Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997); 28 U.S.C. §§ 2244 (b)(2), 2255. The AEDPA's authorization requirements do not apply where the defendant's prior petitions were dismissed, without prejudice. Christy, 115 F.3d at 208.

Hill's first three petitions were resolved after a merits review. All three, however, were filed before the

2. Prior to the enactment of the AEDPA, a district court could dismiss a subsequent § 2255 motion where the defendant failed to allege new or different grounds for relief, termed a "second or successive" motion, or where the defendant raised new grounds that could have been raised in an earlier motion, termed an "abusive motion." Kuhlman v. Wilson, 477 U.S. 436, 444 n.6 (1986); 28 U.S.C. § 2255, Rule 9.

effective date of the AEDPA. Nonetheless, I find that the AEDPA's provisions regarding "second or successive" § 2255 motions should be applied retroactively insofar as petitions filed before the effective date of the Act are counted in calculating the cumulative number of petitions a litigant has filed. See United States v. Black, 1997 WL 703182 *2 (E.D.Pa. Nov. 10, 1997); Dellorfono, 1997 WL 379170 *4. Thus, as Hill's present motion is his fourth, it is successive.³

Furthermore, Hill's present petition could only be a labeled as "first" if he had raised new claims that arose solely from events that occurred at resentencing. See Dellorfono, 1997 WL 379170 *3; See also, Galtieri v. United States, 128 F.3d 33, 38 (2d Cir. 1997)(Concluding that whenever a prior § 2255 motion succeeds in having a sentence amended, a subsequent § 2255 petition will be regarded as a "first" petition only to the extent that it seeks to vacate the new, amended component of the

3. Though many circuits have applied the "second or successive" provision retroactively, they have done so without explanation. On the other hand, the Seventh and the Sixth Circuits have ruled that the AEDPA's "second or successive" provisions do not apply where a prior petition was decided before the date of enactment and where the application of the new law would have the effect of "attaching new legal consequences to events completed before its enactment." See In re Hanserd, 123 F.3d 922, 930-931 (6th Cir. 1997); Burris v. Parke, 95 F.3d 465 (7th Cir. 1996). The Fourth Circuit specifically reserved the issue because the parties had not raised it. In re Vial, 115 F.3d 1192, 1198 n. 13 (4th Cir. 1997)(en banc). Three dissenting judges, however, found that the new "second and successive" provisions for § 2255 petitions should not be applied to cases "in which a prisoner has filed his first § 2255 motion before the AEDPA's effective date and his second thereafter." Id. at 1199-1200 (Hall, J. dissenting). The Third Circuit Court of Appeals has also declined to decide the issue. In re Dorsainvil, 119 F.3d 245, 247 n.1 (3d Cir. 1997). Nevertheless, even if retroactive effect was not given to the revised § 2255 provision, Hill's petition would have been barred as a successive or an abusive petition under pre-AEDPA law. See supra note 2.

sentence.)). Ultimately, Hill's present claims all stem from alleged misconduct which occurred at his initial trial and sentencing. He faults the instructions the jury received, his trial counsels conduct and requests recusal of the trial judge. Thus, Hill's current petition must be treated as a "second or successive" petition for purposes of § 2255.

In sum, because Hill's motion is successive before he can proceed in the instant action, he must move in the United States Court of Appeals for the Third Circuit for an order authorizing the district court to consider the motion.

An appropriate order follows.

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O R D E R

AND NOW, this 6th day of April 1998, upon consideration of Defendant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Docket No. 111); the Government's response (Docket No. 115); and Defendant's reply (Docket No. 117), it is hereby ordered that Defendant's motion, which is a "second or successive" motion, is **DENIED** without prejudice to Defendant's right to seek authorization to proceed from the United States Court of Appeals for the Third Circuit. 28 U.S.C. §§ 2244, 2255 If the Court of Appeals grants authorization, the Clerk is requested to file Defendant's renewed motion in this court under the above docket number.

BY THE COURT:

RONALD L. BUCKWALTER, J.